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No. .....

Supreme Court of the United States

(OCTOBER TERM, 1951)

BUCK JONES and TAFT HAITHCOCK, d/b/a JONES and HAITHCOCK USED CARS,
Petitioners,

VERSUS

A. M. HARPER, Major General, United States Army,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Buck Jones and Taft Haithcock, d/b/a Jones and Haithcock Used Cars, respectfully pray for a writ of certiorari to be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Tenth Circuit rendered on March 27, 1952, reversing a judgment of the United States District Court for the Western District of Oklahoma granting petitioners an injunction against the respondent.

JURISDICTION

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U. S. C., Section 1254(1).

The opinion of the Court of Appeals for the Tenth Circuit was filed March 27, 1952, and an order thereafter entered on May 6, 1952, staying the mandate of that Court until June 5, 1952.

OPINIONS BELOW

The opinion of the District Court was not officially reported, but is printed in the record (R. 33) together with the formal findings of fact and conclusions of law and judgment (R. 39).

The opinion of the Court of Appeals is reported in 195 Fed. (2d) 705 (Advance Sheet) and also appears in the record at pages 91 to 94.

QUESTIONS PRESENTED

I.

Whether the Commanding General of an Army Post exceeds his authority under Army Regulation No. 600-10, authorizing such Commanders to declare an establishment "off limits" to their personnel in "safeguarding the health and welfare" of their troops, by declaring a civilian business establishment off limits as a punitive sanction for refusal to comply with such General's *ex parte* decision of a purely civil controversy between one of his subordinate officers and an automobile dealer over such officer's claim that the dealer breached his contract with and made fraudulent representations to such officer, in connection with the latter's purchase of an automobile, and because of the refusal to rescind the transaction or pay the $1,006.00 damages demanded by such officer.

II.

If the foregoing question is answered in the negative, then whether such Army regulation exceeds the authority conferred by Congress under 10 U. S. C., Section 16, authorizing the President to make "regulation for the government of the Army in accordance with existing laws" but provided that "such regulations shall not be inconsistent with the laws of the United States."

III.

Whether the decision of a civil dispute between an Army Officer and civilians by an Army General commanding the post where such officer is stationed, enforced by an order prohibiting all military personnel of such post coming to the business establishment of such civilians, constitutes an unlawful invasion by the executive of the judicial department of the Government, such controversy being one triable by the Courts.

IV.

Whether due process of law does not require that petitioners have notice and an opportunity to be heard and defend against the charges of breach of contract or fraudulently induced contract be given, before an Army Post Commandant enters an off limits order depriving a civilian establishment of the right to do business with Army personnel.

STATUTE AND REGULATION INVOLVED

The statute involved is 10 U. S. C., Section 16, which reads:

> *"Section 16. Regulations for government of Army; authority of President to make and publish.* The President is authorized to make and publish regulations for the government of the Army in accordance with existing laws, which shall be in force and obeyed until altered or revoked by the same authority: Provided, That said regulations shall not be inconsistent with the laws of the United States."

The pertinent portion of the Army regulation involved, promulgated by the President through the Secretary of the Army, No. AR 600-10, Section 29, provides:

> "29. *Off limits.*—a. To assist responsible commanders in maintaining discipline and safeguarding the health and welfare of military personnel, establishments and areas may be declared 'off limits' for troops, in which case military personnel are prohibited from entering them. Military police may be posted at entrances."

STATEMENT OF THE MATTER INVOLVED

Respondent is the Commanding General of the Artillery Center, Fort Sill, located in the outskirts of the town of Lawton, Oklahoma, wherein petitioners are engaged in the used car business, and do a substantial amount of business with the military personnel stationed at Fort Sill.

On November 18, 1950, petitioners sold a 1950 Pontiac automobile to Lt. Richard D. Bacon who was stationed at Fort Sill under the command of respondent. About two

weeks later the Lieutenant attempted to rescind the transaction, claiming that the car had been misrepresented to him. Thereafter, upon petitioners' refusal to consent to such a rescission, it was suggested by staff officers of respondent that such controversy be compromised by paying the Lieutenant $1,006.00.

Petitioners were advised that if such settlement was not made, the matter would be referred to the Commanding General with a recommendation that petitioners' establishment be posted as "off limits." Petitioners refused to comply, and respondent issued a bulletin prohibiting the military personnel under his command from coming to petitioners' place of business. No hearing was held prior to the promulgation of such order, but merely an *ex parte* "investigation" by respondent's staff officers.

Petitioners instituted this action for an injunction against the enforcement of the order and requiring respondent to rescind it. There was practically no conflict in the evidence. The findings of the trial court and recitation of the facts by the Circuit Court are in harmony.

The trial court entered its judgment granting the injunction prayed for, holding that respondent "transcended his authority when he promulgated the order now in question". The Circuit Court reached a conclusion just to the contrary. The trial court concluded that the aforesaid Army Regulation No. 600-10, giving the defendant the power and authority to issue 'off-limits" orders in situations where the discipline, health or welfare of his military personnel is involved does not reach to decision of purely civil disputes over property; whereas,

the Circuit Court's construction apparently is that the word "welfare" encompasses financial or economic welfare.

The Court of Appeals in its opinion did not question or reject petitioners' contention that the off limits order seriously affected petitioners' business and effectively deprived them of substantial patronage. Nor did the Court take the view that petitioners had any notice and opportunity to be heard and present their side of the case before respondent issued his military off limits edict. The decision is rested squarely on the ground that respondent had the power to exercise an *ex parte*, summary and arbitrary discretion to enter the off limits fiat.

REASONS RELIED ON FOR WRIT OF CERTIORARI

I.

This case raises an important question of Federal Law which has not but should be settled by this Court.

There is no precedent from this Court or other Courts of Appeals for the novel holding of the court below that the Commander of a military installation has the power to decide *ex parte*, summarily and arbitrarily a civil dispute between one under his command and a civilian, involving only a civil dispute over a sale of property, without affording the civilian an opportunity of a hearing; and the power to enforce such decision by prohibiting members of his command from doing business with such concern through the device of an off limits edict.

There has been no construction heretofore of 10 U. S. C., Section 16, authorizing the President to make regulations for the government of the Army, and Army Regulation No. 600-10 adopted pursuant thereto, as authorizing and empowering a Commander to issue an off limits order against an establishment arising out of matters and transactions not involving the health or moral welfare of his command, but only a civil dispute over a business transaction of which the courts have jurisdiction as between civilian and civilian, soldier and soldier, or soldier and civilian.

This is a matter of importance and wide public concern. The last ten years have seen this Country epidemically covered with installations of the Army, Navy and Air Force. In many instances they are located at the edge of small towns or cities and have a tremendous impact upon the business establishments of such places. Some of these were begun because of the location of military personnel and others enlarged their facilities on that account so as to accommodate the requirements and demands of the Army and Navy men, and the right to do business with them is of vital concern. Still more important to the public at large is the feature that the fundamental right of due process is seriously involved.

II.

The decision of the court below is in conflict with applicable decisions of this Court.

The off limits edict of respondent was issued after a refusal of petitioners to rescind the sale of an automobile by petitioners to an officer under respondent's command, or in the alternative to pay such officer $1,006.00 to compromise the dispute over such officer's claim of fraudulent misrepresentations, without petitioners being afforded an opportunity of a hearing at which they could present their side of the controversy, or an opportunity to cross-examine the officer and his witnesses. As a result, petitioners' Army personnel patronage was proscribed. They were thus deprived of their property without due process of law, contrary to the holdings in the following decisions and cases therein cited: *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 95 L. Ed. 817; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 94 L. Ed. 616, 70 S. Ct. 445; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 59 L. Ed. 1027, 35 S. Ct. 625.

The decisions of this Court upholding the power of the judicial branch of the Government to enjoin officials of executive department of the Government acting without power, where the officer exceeded his statutory authority, are contravened by the decision of the court below: *Philadelphia Company* v. *Stimson, Secretary of War*, 223 U. S. 605, 56 L. Ed. 570, 32 S. Ct. 340; *United States* v. *Lee*, 106 U. S. 196, 27 L. Ed. 171, 1 S. Ct. 240; *Work* v. *Louisiana*, 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92; *Santa Fe P. R. Co.* v. *Fall*, 259 U. S. 197, 66 L. Ed. 896, 42 S. Ct. 466;

Waite v. *Macy*, 246 U. S. 606, 62 L. Ed. 892, 38 S. Ct. 395; *Brannan, Secretary of Agriculture* v. *Stark*, 96 L. Ed. 318 (Mar. 10, 1952 Advance Sheet), 321 U. S. 288; 64 S. Ct. 559.

SPECIFICATIONS OF ERROR

The Court of Appeals erred in reversing the Trial Court and:

I.

In holding that the Commandant of an Army Post was exercising a lawful discretionary power in declaring petitioners' establishment off limits for breaching or fraudulently inducing a contract for the sale of an automobile to an officer under his command, and refusing to pay the officer $1,006.00 as damages that he demanded.

II.

In holding that 10 U. S. C., Section 16, and Army Regulation No. 600-10 adopted pursuant thereto, empowering Commanders to declare establishments "off limits" for troops, in the interest of "maintaining discipline and safeguarding the health and welfare of military personnel," authorized such Commanders to exercise such power where health, welfare or discipline were not involved, but only a situation where the civilian establishment prohibited to troops refused to rescind a sale of merchandise to an officer of the Commandant or pay $1,006.00 damages, the amount such officer demanded.

III.

In failing to hold that respondent had no authority to issue an off limits order based on his decision of a civil property rights controversy which is in the domain of the judicial branch of the Government.

IV.

In failing to hold that due process of law was not accorded petitioners by virtue of their being given no opportunity for a hearing on their side of the civil dispute with the officer under respondent's command in a judicial tribunal before issuance of the off limits order, if respondent had any right to issue the order at all.

ARGUMENT

("Opinion Below," "Jurisdiction" and "Statement of the Case" are set forth in the Petition, *supra.*)

Petitioners do not challenge the official discretion of the Secretary of the Army under the authority given by Congress in 10 U. S. C., Section 16, to promulgate a regulation for the government of troops, so long as such regulation is within the statutory requirement that it be "in accordance with existing laws," and the mandate in the proviso of the statute "that such regulation shall not be inconsistent with the laws of the United States." The authority given means that the regulations must confine themselves to the matter of the government of the Army and have some reasonable connection with the discipline, training, health and morals of the men.

Petitioners do challenge the right under this statute to adopt any regulation that attempts to interfere with due process and deprive a civilian selling merchandise to Army personnel, having no connection with health or morals, to have an adjudication of disputes arising out of the same by the courts of the land. In other words, that an Army regulation cannot clothe a man, simply because he is a member of the armed forces, with the special privilege of having his business transactions, rights and liabilities in his relationship with civilians determined by the executive department, rather than the judicial.

However, petitioners do not believe it necessary to construe the subject Army regulation, Section 29 of No. AR 600-10, in such a way as to compel its invalidity under the statute. The regulation authorizes commanders of military installations to declare establishments off limits for troops for the purposes of (1) maintaining discipline, and (2) safeguarding the health and (3) safeguarding the welfare of military personnel.

The trial court in its memorandum opinion (R. 33) construed this regulation thus:

> "The authority conferred embraces only situations where the discipline, health or *moral* welfare of military personnel is involved. No such situation is here presented. No military matter was involved. The fact that one of the parties to the private business transaction was in the military services does not change its nature.
>
> * * * * * * *
>
> "The plaintiff's right to enjoy the patronage of military personnel is a property right. The loss of this

> property right was not incidental to a lawful order entered for an authorized purpose such as safeguarding the health and welfare of military personnel. The order here was entered for the purpose of depriving plaintiffs of that property right and had that effect. It constituted a taking of private property without due process of law." (Emphasis ours).

The Court of Appeals was in error in reversing this construction of the trial court and holding that commanding officers under the regulation and the statute had the power to execute an arbitrary discretion over any conceivable matter in any wise affecting the troops, whether it is a private business transaction or their health. This is too broad a construction of the regulation and of the word "welfare" used therein.

The trial court found (R. 33) in granting the injunction that had petitioners paid $1,006.00 to the officer under respondent's command, as such officer demanded in settlement of his controversy, the off limits order would not have been made. Could it be possible that the payment of this money or the rescission of the transaction as originally demanded by the officer—whether the officer was right or wrong—would have purged petitioners' business establishment of its iniquitous nature so as to have made it pure and fit for military personnel to trade with? No, it was merely the carrying through of a punitive measure that had been threatened in an effort to coerce a settlement or rather compliance with the officer's demands.

Suppose that the respondent Commanding General had a relative engaged in the used car business as a competitor of petitioners, respondent could arbitrarily issue

an off limits order, as was done here. He could do so to help his relative and his actions could not be inquired into.

Suppose the Commanding General was a strong Baptist, could he declare the other churches off limits if he so desired?

No notice was given and opportunity for petitioners to be heard and confronted with the evidence against them and to introduce evidence in refutation thereof, before a judicial tribunal. They were given no day in court on this ordinary, civil dispute over the matter of the sale of merchandise—an automobile. Merchandise which has no connection with the officer's military discipline, duties or health. The controversy was an orthodox one for the courts, and because the officer was a member of the military personnel did not make it any different. Due process of law was not accorded.

The decision of the Fourth Circuit in *Ainsworth* v. *Barn Ballroom*, 157 Fed. (2d) 97, cited by the court below as authority for its decision, is not applicable, as manifestly the morals and health of the military personnel were there reasonably involved. There was no civil dispute over property rights. Therefore, principles of law are correctly stated and correctly applied therein.

To use the language of Mr. Justice Frankfurter in his specially concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 95 L. Ed. 817, 71 S. Ct. 624:

> "Fairness of procedure is 'due process in the primary sense.' *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673, 681, 74 L. Ed. 1107, 1114, 50 S. Ct.

> 451. It is ingrained in our national traditions and is designed to maintain them. In a variety of situations the Court has enforced this requirement by checking attempts of executives, legislatures, and lower courts to disregard the deep-rooted demands of fair play enshrined in the Constitution."

The Court then goes on to say that one of the most fundamental principles inhering in "due process of law" is that no person shall be deprived of his liberty or property *without opportunity at some time to be heard.*

And it is pointed out that this requirement of due process is neither "a fair-weather or timid assurance" nor "a technical conception with a fixed content unrelated to time, place and circumstances." There is no doubt that the action of the respondent and the decision upholding it by the Court of Appeals are contrary to this recent decision of this Court and the many cases referred to therein.

Of course it goes without saying that petitioners' right to do business with the military personnel stationed at Fort Sill Artillery Center on the edge of Lawton, Oklahoma, one of the oldest military installations in the Nation, is a property right. And it would be blindness to say that a business establishment of this kind in a small town the size of Lawton, located adjacent to a large Army installation with thousands of troops, would not be injured by being deprived by military fiat of their custom.

The *Joint Anti-Fascist* case, wherein the Attorney General of the United States himself was enjoined as violating the due process requirement and exceeding his power and authority, is conclusive against the holding

of the Court of Appeals, and such holding is diametrically opposed to the reasoning and decision of this Court in such case.

Of course there have been many occasions where an officer of the Government has been enjoined by the courts not because of an erroneous exercise of discretion, but because he exceeded the power conferred upon him by the law. *Sawyer, Secretary of Commerce* v. *Youngstown Sheet and Tube Co.* (Steel Case), — U. S. —, decided June 2, 1952, not yet officially reported, affirming decision of District Judge Pine, 103 Fed. Supp. 569; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 95 L. Ed. 918; *Philadelphia Company* v. *Stimson, Secretary of War*, 223 U. S. 605, 56 L. Ed. 570, 32 S. Ct. 340; *Waite* v. *Macy*, 246 U. S. 606, 62 L. Ed. 892, 38 S. Ct. 395; *Santa Fe P. R. Co.* v. *Fall*, 259 U. S. 197, 66 L. Ed. 896, 42 S. Ct. 466; *United States* v. *Lee*, 106 U. S. 196, 27 L. Ed. 171, 1 S. Ct. 240.

Respectfully submitted,

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